Draft Amendments to Civil Service Rules

Revision **A** (November 19, 2001)

[Added text is underlined. Deleted text is ~~struck-through~~]

Index of Proposed Amendments

1-8 Prohibited Discrimination

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1-8.4 Bona Fide Occupational Qualification

An appointing authority may establish a bona fide occupational qualification based on religion, national origin, sex, age, marital status, height, or weight, only if it is consistent with applicable law and is approved in advance by the state personnel director. ~~Michigan civil rights commission. If the appointing authority does not obtain advance approval, the employer has the burden of establishing that the qualification is reasonably necessary to its normal operation.~~

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STAFF COMMENT ON **RULE 1-8.4**. The current text of Rule 1-8.4 is based on the section of the Elliott-Larsen Civil Rights Act (ELCR Act; MCL §37.2208) dealing with bona fide occupational qualifications (BFOQs). The ELCR Act permits (but does not require) the appointing authority to get advance approval for a BFOQ from the civil rights commission.

The proposed amendment to Rule 1-8.4 is intended to reflect that a BFOQ is—in the first instance—a classification matter that requires civil service approval. For example, before an appointing authority may limit applicants for a particular classified position to females only, civil service must approve classification specifications that establish *female gender* as a BFOQ for that classification. The proposed amendment establishes that civil service must approve any BFOQ.

Of course, in addition to required civil service approval, a BFOQ also must be consistent with applicable federal and state discrimination laws. If the amendment is adopted as proposed, the appointing authority remains free to seek advance approval of the civil rights commission under the ELCR Act after the BFOQ has been approved by the state personnel director.

The proposed amendment would make this BFOQ section consistent with the affirmative action section, Rule 1-8.5, that also requires prior approval by the state personnel director. Rule 1-8.5 reads as follows:

> "**Rule 1-8.5 Elimination of Present Effects of Past Discrimination**
>
> "An appointing authority may adopt and carry out a plan to eliminate the present effects of past discriminatory practices with respect to religion, race, color, national origin, sex, or disability if the plan is approved in advance by state personnel director and is otherwise consistent with applicable law."

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COMPARE THE ELCR ACT:

> "**MCL 37.2208. Exemption for bona fide occupational qualification**
>
> "A person subject to this article may apply to the [civil rights] commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. Upon sufficient showing, the commission may grant an exemption to the appropriate section of this article. An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business."

2-5 Employment Preference

2-5.1 Application and Protection

(a) Application. Unless otherwise provided in an approved departmental layoff plan, an employee can apply employment preference only within the employee's current principal department or autonomous entity. However, an employee cannot apply preference against a position or classification that is protected from the application of employment preference.

(b) Limited-term appointments. An employee is not eligible to exercise employment preference or to be placed on a recall list at the end of a limited-term appointment, unless the employee meets one of the following criteria:

(1) An employee with status gained from an indefinite appointment who accepts or receives a ~~lateral~~ job change to a limited-term appointment may exercise employment preference at the end of the limited-term appointment. Employment preference begins at the last classification level at which the employee achieved status in an indefinite appointment before accepting the limited-term appointment. Employment preference may be exercised only within the principal department or autonomous agency that appointed the employee to the limited-term appointment.

(2) A person who is recalled on a limited-term basis is not eligible to exercise employment preference at the end of the limited-term appointment but shall be returned to all recall lists for which the employee is eligible.

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STAFF COMMENT ON **RULE 2-5.1(b)(1)**. The proposed amendment merely omits the inadvertent reference to "lateral" job change in rule 2-5.1(b)(1). An employee with status who takes any type of job change—lateral or otherwise—into a limited-term position is eligible to exercise employment preference when the limited-term appointment ends.

2-16 Assumption into Classified Service

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2-16.4 Treatment of Employees

An employee who is appointed to a position assumed into the classified service is considered as a new hire without status as of the assumption, except as authorized by rule, regulation, or the state personnel director. Unless prohibited by these rules, the director may approve in writing the transfer to the classified service of some or all of a benefit, credit, status, seniority, or contract right accrued by an employee under a previous employer.

2-16.5 Pay and Benefits

The state personnel director shall establish the pay and benefits for an employee appointed to a position after consultation with the state employer and the appointing authority in accordance with the following standards:

(a) Pay. The initial rate of pay for an employee whose position is assumed is established at the state pay level closest to, but not less than, the employee's rate of pay before assumption. The state personnel director may, at the request of the state employer or the appointing authority, approve continuation of a rate of pay that exceeds the maximum for the classification if the employee's pay is red-circled.

(b) Transfer of annual leave and sick leave balances. If the employee has not been compensated for annual and sick leave balances outstanding on the date of assumption, the state personnel director may approve the transfer of all or a portion of the balances to the classified service. The number of hours transferred cannot exceed the maximum number permitted in the compensation plan. The state of Michigan is not liable for the value of any excess balance that is not transferred.

~~**(c) Longevity.** If the previous employer had a longevity pay plan, the state personnel director may authorize longevity credit for employment before the date of assumption. If the previous employer had no longevity pay plan, the employee is not eligible for longevity credit.~~

(c~~d~~) Retirement. The employee is eligible for retirement credit only as provided by law.

STAFF COMMENT ON **RULE 2-16**. The current mandatory prohibition of longevity in subsection (c) is incompatible with the new HRMN system. Currently, in HRMN, the same seniority "counter" is used for determining eligibility for both annual leave credits and longevity credits. Therefore, if an assumed employee has different seniority for longevity than for annual leave, the appointing authority has

to process a manual override to correct the longevity eligibility. Staff proposes repealing the prohibition on longevity credits in subsection (c) to give the state personnel director the option of granting longevity credit even when the prior employer had no such plan. If subsection (c) is repealed, the state personnel director—under the general authority in Rule 2-16.4—will have the authority to approve longevity seniority for all assumed employees in the same discretionary manner that the director now approves annual leave seniority.

2-19 Legal Representation ~~Services~~

~~An appointing authority, in cooperation with the attorney general, shall pay for or engage the services of an attorney to advise and represent a classified employee in any claim or action against the employee alleging negligence or other actionable conduct.~~ If an employee is named in any civil claim or action alleging negligence or other actionable conduct arising out of employment in the classified service, the employee may request that the appointing authority provide the services of an attorney at state expense to represent the employee. If the appointing authority determines that the conduct alleged (1) occurred during the course of the employee's employment and (2) was within the scope of the authority delegated to the employee, the employee is entitled to legal representation at state expense, subject to the following conditions:

(a) If the appointing authority authorizes legal representation at state expense, the appointing authority shall first request that the attorney general represent the employee. If the attorney general declines to represent the employee, the appointing authority may, at its option, either hire an attorney to represent the employee or authorize the employee to hire an attorney. If the employee hires an attorney, the appointing authority shall reimburse the employee for all necessary and reasonable attorney fees and costs incurred.~~The employee must have been acting in the course of employment when the alleged conduct occurred and had a reasonable basis for believing that the conduct was within the scope of the authority delegated to the employee.~~

(b) The appointing authority is not required to provide legal services at state expense ~~No legal services are required~~ in connection with prosecution of a criminal suit against an employee.

(c) Nothing in this rule requires an appointing authority to ~~the~~ reimburse~~ment of~~ an employee or insurer for legal services to which the employee is entitled under a policy of insurance.

STAFF COMMENT ON **RULE 2-19**. The amendment is proposed to change the standard under which an employee is entitled to state-paid legal assistance.

Following its decision in a recent appeal, *DCIS v Baker*, CSC 2001-044, the commission asked staff to propose an amendment to Rule 2-19. In *Baker*, the hearing officer relied on a prior commission decision, *Schneider v Department of*

Mental Health, ERB 95-055. In *Schneider*, the commission had held that the test for evaluating a request for legal representation was whether the employee had a "reasonable basis" for believing that his or her alleged misconduct was within the employee's delegated scope of authority. Following its review, the commission was persuaded that the test articulated in *Schneider* was incorrect and that Rule 2-19 should be modified.

The proposed amendment would reject the subjective "reasonable basis" test in *Schneider*. Under the test proposed in the amendment, the employer must decide whether the employee's misconduct alleged in the civil action (1) occurred during the course of the employee's employment and (2) was within the scope of the authority delegated to the employee. Under the amendment, the employee is entitled to state-paid legal representation only if the employer first determines that the alleged misconduct meets this test. If the alleged misconduct does not meet this test, the appointing authority is not required to provide state-paid legal representation.

If the employer denies an employee's request for state-paid legal representation, a nonexclusively represented employee may file a civil service grievance. However, the employee will have the burden of proving by a preponderance of the evidence that the employee's decision to deny state-paid legal representation was arbitrary and capricious. [See *Baptist v Department of Corrections*, CSC 97-02.]

The proposed amendments do not alter the current requirements that the attorney general first be asked to represent the employee. If the attorney general declines, the employer may hire an attorney for the employee or authorize the employee to obtain counsel.

The current discretionary option for the employer to provide legal representation for an employee charged with a *crime* remains unchanged.

NOTE: This Rule 4-5 is the version approved by the Civil Service Commission on January 24, 2001, to be effective January 1, 2002. The proposed amendment, if approved, would also become effective January 1, 2002.

4-5 Working out of Class

(a) Working out of class assignment. An appointing authority may temporarily assign an employee to work out of class only if (1) the employee is performing the duties and responsibilities of an existing position or (2) the department of civil service has approved in advance a request for the employee to work out of class. A working-out-of class assignment cannot exceed one year.

(b) Working-out-of-class pay. If an employee is assigned to work out of class for more than 10 ~~or more~~ consecutive workdays, the employee is entitled to supplemental pay and benefits for the temporary assignment in accordance with the civil service rules and regulations.

(1) Claims for working-out-of-class pay. If an employee is assigned to work out of class and does not receive authorized supplemental working-out-of-class pay and benefits, the employee may request a technical working-out-of-class determination.

(A) Time limit. A request for a technical working-out-of-class determination must be filed during the working-out-of-class assignment or within 28 calendar days after the end of the assignment.

(B) Back pay. In a technical working-out-of-class determination, the civil service review officer may award back pay and benefits for working out of class for a maximum of one year before the end of the working-out-of-class assignment. No supplemental working-out-of-class pay or benefits are payable for any period longer than one year even if the employee worked out of class for more than one year.

(2) Relation to collective bargaining. Working out of class is a prohibited subject of bargaining. The exclusive procedure for any employee, including an exclusively represented employee, to bring a claim for working-out-of-class pay or benefits is to file a request for a technical working-out-of-class determination.

(c) Exclusions. An employee in any of the following circumstances is not considered to be working out of class:

(1) The employee is working in a preauthorized position.

(2) The employee is occupying a position downgraded for training.

(3) The employee is occupying a position that is reclassifiable.

(4) The employee is an overall assistant who normally substitutes for the employee's supervisor.

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STAFF COMMENT TO **RULE 4-5(b), effective January 1, 2002**. The proposed amendment to the version of rule 4-5(b) that is scheduled to go into effect on January 1, 2002, corrects an unintended change in the current working-out-of-class rule.

Under the rules in effect today, an employee is eligible for working-out-of-class pay beginning on the 11th consecutive day of working out of class. That is, working-out-of-class pay is not triggered until the employee begins the 11th consecutive workday. This formula permits an appointing authority to assign higher level duties to an employee for up to 10 consecutive workdays (i.e., the standard two-week vacation period) *without* incurring liability for working-out-of-class pay.

When the text of rule 4-5(b) was approved by the commission to go into effect on January 1, there was no intent to change the existing working-out-of-class formula. However, the phrase "10 or more consecutive workdays" was inadvertently substituted for the phrase "more than 10 consecutive workdays." If this inadvertent change goes into effect on January 1, the eligibility trigger will be lowered from *more than* 10 consecutive workdays to 10 consecutive workdays. As a result, employees would be eligible for working-out-of-class pay after completing 10 consecutive workdays, rather than requiring *more than* 10 consecutive workdays, as is the current practice.

The proposed amendment will retain, after January 1, 2002, the working-out-of-class formula that is currently in effect.

4-6 Senior Executive Service (SES)

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4-6.2 Conditions of Employment

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(e) Reappointment.

(1) No right to reappointment. An appointee to the senior executive service has no expectation in, or right to, a reappointment at the expiration of an appointment. There is no requirement that a department provide any reason or justification for not

reappointing a person to a further term in the senior executive service. Reappointment is solely within the discretion of the appointing authority. No action by an appointing authority may create an expectation in, or right to, reappointment.

(2) Time limits. If an appointing authority reappoints a senior executive, the appointing authority and the senior executive shall execute a new senior executive agreement to take effect at the expiration of the original appointment, subject to the approval of the state personnel director. A senior executive agreement cannot be executed more than 6 months before the earliest effective date of the appointment. Any senior executive agreement executed more than 6 months before the effective date of the appointment is void and cannot be enforced. Any senior executive agreement that purports to be effective for more than 2 years is void and cannot be enforced.

(3) Continuation in position not effective. A person cannot continue in a senior executive service position without a valid appointment agreement. Continuation in a senior executive service position without a valid appointment agreement approved by the state personnel director, with or without the consent of the appointing authority, cannot create an enforceable appointment.

(4) Improper classification. If the department of civil service determines that a senior executive service position is not properly classified, an appointing authority cannot appoint or reappoint any person to the position or execute a senior executive service position agreement for the position until the department of civil service has approved an updated position description and properly classified the position.

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4-7 Senior Executive Management Assistant Service (SEMAS)

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4-7.2 Conditions of Employment

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(e) Reappointment.

(1) No right to reappointment. An appointee to the senior executive management assistant service has no expectation in, or right to, a reappointment at the expiration of an appointment. There is no requirement that a department provide any reason or justification for not reappointing a person to a further term in the senior executive management assistant service. Reappointment is solely within the discretion of the appointing authority. No action by an appointing authority may create an expectation of, or right to, reappointment.

(2) Time limits. If an appointing authority reappoints a senior executive management assistant, the appointing authority and the senior executive management assistant shall execute a new senior executive management assistant service agreement to take effect at the expiration of the original appointment, subject to the approval of the state personnel director. A senior executive management assistant service agreement cannot be executed more than 6 months before the earliest effective date of the appointment. Any senior executive management assistant service agreement executed more than 6 months before the effective date of the appointment is void and cannot be enforced. Any senior executive management assistant service agreement which purports to be effective for more than 2 years is void and cannot be enforced.

(3) Continuation in position not effective. A person cannot continue in a senior executive management assistant position without a valid appointment agreement. Continuation in a senior executive management assistant position without a valid appointment agreement approved by the state personnel director, with or without the consent of the appointing authority, cannot create an enforceable appointment.

(4) Improper classification. If the department of civil service determines that a senior executive management assistant service position is not properly classified, an appointing authority cannot appoint or reappoint any person to the position or execute a senior executive service position agreement for the position until the department of civil service has approved an updated position description and properly classified the position.

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STAFF COMMENT ON **RULES 4-6.2(e)** and **4-7.2(e)**. The proposed amendments add new subsections to address the effect of an improper classification of an SES or a SEMAS position. With the amendment, if an SES or a SEMAS position becomes improperly classified, no one may be appointed or reappointed to the position until the department of civil service approves an updated position description for the position and properly classifies the position.

5-3 Compensation Schedules

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5-3.4 Operation of Compensation Schedules

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(e) Salary rate for temporary projects. Upon request of an appointing authority, the state personnel director may approve alternative or supplemental compensation that exceeds the scheduled maximum rate of pay for an employee assigned to a temporary project. The appointing authority must receive written authorization for the project pay from the department of civil service before the employee is assigned to the project. Temporary project pay may not exceed two years without the written authorization of the state personnel director.

> STAFF COMMENT TO **RULE 5-3.4**. Temporary project pay is designed to be just that—"temporary." The proposed amendment establishes a two-year limit on project pay (but permits the state personnel director to authorize in writing an extension, if necessary).

8-7 Appeal to Civil Service Commission

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8-7.3 Time Limits for Appeal to Commission

(a) Time limits for appeal to commission. Except where another rule establishes a shorter period, ~~A~~a claim of appeal or an application for leave to appeal must be received by the employment relations board within 28 calendar days after the date the final decision of the adjudicating officer is issued.

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> STAFF COMMENT ON **RULE 8-7.3**. Some other rules (e.g., Rules 6-3.5, 6-6.1, and 6-6.4) provide that appeals to the civil service commission must be received by

the employment relations board within 14 calendar days, not 28 calendar days. The proposed amendment merely clarifies that a specific, shorter appeal period in another rule takes precedence over the general 28-day period in rule 8-7.3.

9-1 Definitions

Unless the context clearly provides otherwise, the following terms in the civil service rules and regulations are defined as follows:

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Advisory

Advisory means a written statement issued by the civil service commission, state personnel director, or department of civil service to provide future direction, clarification, or other necessary or useful information. An advisory does not have the force and effect of law and does not bind the commission, director, or department.

*** * ***

Regulation

Regulation means a formal, general written enactment issued by the state personnel director that: (1) exercises, implements, or applies powers granted to the director in article 11, section 5, of the constitution; (2) exercises, implements, or applies powers granted to the director or the department of civil service by civil service rule; or (3) prescribes the procedures or practices of the department of civil service. ~~A regulation does not include the following:~~

~~**(a)** A determination, decision, or order in a contested case, technical appeal, or individual labor relations matter.~~

~~**(b)** A determination, declaratory ruling, order, or other disposition by the state personnel director of a particular matter as applied to a specific set of facts.~~

~~**(c)** A personnel or administrative action by the state personnel director.~~

~~**(d)** A form with instructions, an interpretive statement, an informational pamphlet, or other material that in itself does not have the force and effect of a regulation but is merely explanatory.~~

~~**(e)** An advisory.~~

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Rule

Rule means a statement of general applicability approved by the civil service commission and published by the department of civil service that (1) exercises, implements, or applies powers granted in article 11, section 5, of the constitution or (2) prescribes the procedures or practices of the department of civil service. A rule has the force and effect of law unless a court of competent jurisdiction determines that the rule is unconstitutional or otherwise contrary to law.

STAFF COMMENT TO DEFINITIONS OF "ADVISORY," "REGULATION" AND "RULE." This proposal adds the definitions of two terms, "advisory" and "rule," that now appear only in Regulation 1.01. The definition of "regulation" is clarified and pared to its core concept.